

1 (Whereupon, end of in

2 camera proceedings.)

3 MR. REICHART: Can you tell us or can you
4 verify now -- I don't know if Mr. Forde is aware of
5 the contract that you had with the individuals that
6 compiled the tapes, but is there a reason -- or is
7 there a way that more than one copy of the tapes can
8 be provided to the parties?

9 MR. ROONEY: As we talked off the line, there
10 was a cost issue, your Honors, but we're going to go
11 back and see if we can get a separate copy for staff
12 considering the geographic issues.

13 And I can get back to you, if not
14 later today, tomorrow. Okay?

15 MR. REICHART: Thank you.

16 MR. PERA: There is another issue that Allan
17 brought to my attention, because he's dropping
18 statute as somewhat prescriptive.

19 And I just want it on the record that
20 the Nicor lawyers understand that they are turning
21 over to us tapes that have -- that may contain a
22 discussion between their client and an attorney

1 because you get into, you know, issues of consensual
2 overhear and the limits of a tape-recording and
3 there's an attorney on the other line.

4 You know, if it were a criminal
5 investigation and we're overhearing or our
6 investigators are overhearing a discussion between
7 the target and his lawyer, you've got to shut the
8 tape off because you can't record that kind of stuff.
9 We don't know whether or not there was consent on the
10 other side.

11 I mean, I just can't be placed in a
12 position as a representative from the State's
13 Attorney's Office where I'm -- with my eyes wide open
14 I'm walking into a minefield with these tapes that
15 could reverberate back on us.

16 Other parties may not have that same
17 concern, I don't know, but that office has that.

18 MR. ROONEY: Just going back, your Honors, what
19 we're asking for is obviously the order from
20 yourselves regarding our production.

21 What we're also asking, though, that
22 at this point we're not waiving the company's right

1 to assert an attorney privileged conversation on
2 attorney/client grounds as well any admissibility
3 issues.

4 Because obviously we have no idea
5 what's on the vast majority of the recording. As to
6 Mark's point, you know, he makes a valid point and
7 that is setting aside the privilege issue, there may
8 be issues with regard to the eavesdropping statute as
9 it's applied in Illinois.

10 I've right now -- and I've informed
11 counsel for the other side, that on the sample that
12 we've listened to there's certainly a number of
13 conversations where there's an audible beep every 20
14 seconds.

15 I can also tell you that there are
16 certain conversations where no beep exists. And I
17 don't know what the thought is between the two
18 parties in terms of who -- if they believed they were
19 being recorded or not. That's a factually true issue
20 that I can't answer to you today.

21 What I can say is, yes, they're
22 recordings that cover both at least from an audible

1 beep sound. There are a lot that do and some that
2 don't.

3 And I'm not here to argue privilege
4 issue today. I think we're just reserving it. Rob,
5 you've identified before that there was one
6 conversation that Mike Forde just apprised me of
7 where this concerned a draft contract and what should
8 be included or excluded in a draft contract.

9 If that's what we're talking about, it
10 may not even be relevant to this case in many
11 respects; but, you know, if people are asking about
12 the terms and conditions transaction, that was a
13 conversation that was going on, it's not necessarily
14 anything to do with PBR. Because, again, these folks
15 were traders and schedulers at a level.

16 And the other issue Mark raised in
17 terms of organization, what we've done is we -- each
18 CD has a number of files on it. The recordings go
19 from April 1st, 2001, through 12/31/02, which is a
20 PBR period.

21 And what we have compiled is a disk
22 that has an index of each and every call on each CD.

1 So CD number one has files one to a thousand, and the
2 same for each. So you know what CD and what file.
3 And each file has its own conversation.

4 We're also providing parties with a
5 list of a file because the file also reflects what
6 extension the call was recorded from.

7 MR. PERA: Do we get a listings of the
8 extensions?

9 MR. ROONEY: Yes, with the names of the
10 individuals who could have used that.

11 MR. PERA: Is the lawyer that may have been
12 taped an in-house lawyer?

13 MR. ROONEY: Well, the one that we know of is,
14 yes.

15 MR. PERA: It's an in-house lawyer. So we have
16 an in-house Nicor employee tape-recording an in-house
17 conversation with an in-house lawyer.

18 MR. ROONEY: Yeah.

19 JUDGE DOLAN: Did the employees realize they
20 were being recorded, the Nicor employees?

21 MR. ROONEY: It is my understanding that the
22 employees -- yes, they did. These were all supply

1 department folks.

2 The question is, in Illinois, there's
3 a two-party consent; and to the extent that there
4 were calls made where that beep wasn't discernible,
5 whether that third party knew, as I sit here today, I
6 couldn't tell you.

7 MR. KELTER: You know, maybe I'm being dim here
8 but is there -- I'm not understanding what happened
9 because it sounds like the tapes -- the taping was
10 being done of more than just trades.

11 MR. ROONEY: Well, those phones are
12 permanently -- you pick up the phone and make a call
13 or receive a call --.

14 MR. KELTER: And it's automatically taped?

15 MR. ROONEY: Correct.

16 MR. KELTER: Is there something you're giving
17 us that tells us exactly what phones those were so we
18 understand what's going on?

19 MR. ROONEY: Yeah. What we're giving you is --
20 each file has a number which reflects the extension
21 of the phone, the number extension for that line.
22 Okay?

1 And that's on the CD. What we're
2 providing separately is the table that reflects the
3 extension and who had that extension or what number
4 of different people may have had access to the
5 extension for making a call.

6 MR. ANDREOLI: There are approximately ten
7 extensions, ten phones.

8 MR. KELTER: That were being taped all the
9 time.

10 MR. ANDREOLI: That are involved. That's my
11 understanding. So it's not an infinite -- it's not
12 infinite or ad hoc in that sense if that phone was on
13 at all times.

14 MR. KELTER: Well, I don't know if this is the
15 time to get into this but some of the people who were
16 taped weren't -- or let me rephrase it.

17 Were any of the people who were being
18 taped aware of the discovery that was going on in
19 this case over the last couple years?

20 MR. ROONEY: Yes.

21 MR. KELTER: And --.

22 MR. ROONEY: I can't answer your next question

1 then.

2 MR. KELTER: Which my next question, which I
3 want to put on record just so that it's on the
4 record, which is, how did it happen that we got to
5 this point where people who were involved in the
6 discovery process weren't forthcoming with this
7 information now? And I hate to say it, but how do we
8 even know there's not more?

9 MR. ROONEY: I'm going to treat that as a
10 rhetorical question because I certainly can't answer
11 why it made -- Mr. Pera earlier said that he was
12 disheartened. I can tell you that no one was more
13 disheartened than outside counsel when they found out
14 the existence of this recordings. And we didn't find
15 out about these until the end of April.

16 MR. PERA: Well, someone's got to -- I think we
17 can close all this up. I mean, obviously, it's up to
18 the ALJ, but we're going to need some information
19 under oath from folks, whoever that may be.

20 I suppose we're going to have to go
21 the route of the data request that, you know, these
22 are the tapes, you know, all the other questions that

1 I raised. There's no other way to get to it other
2 than data request.

3 And even then, as I'm learning to my
4 chagrin in this process, they're not necessarily
5 under oath, right, is my understanding?

6 So I don't know how we're going to get
7 to this. But this is obviously a very critical
8 issue.

9 MR. KELTER: Yeah, my question is, how do we
10 know? It's not a rhetorical question. I think it's
11 a fair question at this point.

12 MR. ROONEY: And that's a fair question.

13 MR. PERA: Nicor has obligations under the
14 eavesdropping statutes to notify people that were
15 taped.

16 I'll be perfectly candid. This is a
17 surprise to John. The first words out my mouth when
18 I heard about it was, you know, where did the
19 tape-recording take place, i.e., what jurisdiction?
20 You know, does this fall within -- whose purview?
21 This obviously took place in Naperville. You know,
22 this is going to be like an onion now where the

1 layers are going to have to be peeled off.

2 MR. ROONEY: Just to put, I think, more light
3 on it. Realize that traders and schedulers, they
4 record the conversations a lot to confirm
5 transactions, you know, for audit purposes at a later
6 point in time.

7 So, you know, what happens, you know,
8 not only in the gas trade of the business but when
9 you try to sell stock or something like a broker,
10 they record it as well.

11 The issue here, I think, as Mark
12 pointed out precisely, is one of disclosure. I think
13 there's certainly Illinois law of what disclosure is
14 or is not. There's also the fact that there's an
15 audible beep. You know, there's a sound that you can
16 tell that if you have a question, you wondered why.

17 It's more to the question that there
18 are instances where there's not that audible sound;
19 and, obviously, that's something Nicor has to deal
20 with independent of this proceeding at this point.

21 MR. PERA: We're thinking about taking a
22 two-minute -- I ask, where do we go from here? And I

1 don't know whether you want us to talk privately and
2 report back to you or if you have an idea where you'd
3 like to see us at.

4 JUDGE DOLAN: Well, if you guys want to take
5 some time to discuss it, I think we need to discuss
6 it ourselves; so we'll go off the record.

7 JUDGE HAYNES: One concern -- a question that
8 came to my mind was, is there some -- obviously Nicor
9 hasn't reviewed everything, but the conversations
10 that may be privileged or, you know, are perhaps
11 completely personal, is this really -- should
12 everything be turned over, or would it be better to
13 have a privilege log at least for ones that you're
14 claiming attorney/client privilege? I'm not making
15 any ruling or anything. This is a thought that
16 occurred.

17 MR. ROONEY: It's a -- one of the -- you know,
18 we were actually kicking it around about saying maybe
19 we can do this with regard to this one item we have
20 here, but the dilemma we have here is, I don't know
21 what other privileged conversations there are, your
22 Honor, on the other 30,000 files.

1 MR. KELTER: It seems like -- it hasn't been
2 said, but I'm assuming the reason you're turning
3 these over to us now is because this is going to take
4 forever as it is, and it would take forever twice if
5 they listened to everything, try and figure out
6 what's there and then we start having battles.

7 First of all, it means that we can't
8 start listening to anything for X more weeks.

9 JUDGE HAYNES: Could it be handed over in
10 chunks as they go through them? I'm just throwing
11 ideas out.

12 MR. KELTER: And I'm not saying -- we share
13 your concerns. You know, I don't know like getting
14 something that, you know, that maybe we shouldn't
15 have and then the burden is on us to make sure that
16 nothing is disclosed.

17 But on the other -- I'm just not
18 seeing how we can -- I think we should figure --.

19 JUDGE HAYNES: Then maybe you should talk among
20 yourselves.

21 MR. ROONEY: To the privilege issue, I
22 understand completely. The other issue, maybe other

1 stuff that shouldn't be part of it -- as my
2 colleague, Mr. Pera, noted to me the other day about
3 the relevance issues, they didn't want necessarily,
4 the fox starting in the henhouse I believe.

5 So in that regard -- and I think I'm
6 quoting that precisely, right, Mr. Pera?

7 MR. PERA: That sounds like something I'd say.

8 MR. ROONEY: That's why we're handing these
9 over. And I guess maybe even to summarize, what
10 we're really seeking is a ruling to turn it over
11 subject to the fact that, one, we're not waiving any
12 privileges; two, we're not waiving any admissibility
13 issues. And we're turning over recordings that went
14 from April of '01 through 12/31/02.

15 JUDGE HAYNES: Okay. You guys want some time
16 to talk?

17 MR. PERA: Well, no. Actually, I think that's
18 agreeable. You know, we can't have it both ways. We
19 can't make them turn it over to us and then bat them
20 over the head because they didn't edit them.

21 So I think it's maybe a couple minutes
22 to talk, but it's probably going to take six weeks,

1 I'm guessing to hear these tapes -- listen to these
2 tapes. That's not even including the EKT recordings.
3 God knows when we're going to get those.

4 MR. ROONEY: And just --.

5 MR. PERA: So perhaps, you know, we send out
6 data requests as we think is appropriate and set it
7 for a status in six weeks. What else is there to
8 talk about?

9 MR. ROONEY: That's fair.

10 JUDGE DOLAN: That's fine.

11 MR. ANDREOLI: A minor technical point for
12 purposes of your Honors interested in entering a
13 ruling today.

14 It would be appropriate for the ruling
15 to compel, to order Nicor Gas to produce. I think
16 that wasn't clear.

17 MS. VON QUALEN: This is Jan Von Qualen in
18 Springfield. And I wanted to point out in response
19 to what Mr. Pera just said about taking six weeks or
20 so to listen to.

21 By our calculation, it would take
22 somebody working full-time for ten months. And this

1 is on top of the volume that EKT is also going to be
2 provided. Just so that people understand that we
3 don't see six weeks or six months as doable.

4 MR. ANDREOLI: I believe the EKT set is large,
5 Jan.

6 MR. KELTER: That's the problem with 1500
7 hours. Even if you have ten people listening, I
8 mean, that's 150 hours per person, which would one
9 month of everybody's time if everybody quit their job
10 other than doing this.

11 So I'm not sure I agree with my
12 esteemed colleague about how we can go about this and
13 what the proper time frames are. And that's why I
14 think we need -- let's take a few minutes --.

15 MR. ANDREOLI: Would add, though, it may not be
16 quite that onerous. The vast majority of these calls
17 really aren't going to have anything to do with this
18 proceeding and that should be fairly evident early in
19 the calls. So it --.

20 MR. KELTER: Can you skip from one call to
21 the -- can you skip through the call on the tape?

22 MR. ANDREOLI: Yes.

1 MR. ROONEY: Just use your. . .

2 JUDGE HAYNES: How about we give you ten
3 minutes talk about this.

4 JUDGE DOLAN: We'll go off the record.

5 (Whereupon, a discussion
6 was had off the record.)

7 JUDGE HAYNES: Back on the record.

8 We've had a brief discussion and we're
9 going to continue this for two weeks instead of -- or
10 until July 21st instead of six weeks.

11 Was there something else that needed
12 to be covered today?

13 Mr. Pera.

14 MR. PERA: No, I don't think there's anything
15 more.

16 JUDGE HAYNES: Are we expected to rule today,
17 or are we just continuing this at this point?

18 MR. PERA: No, I think we need an order to --.

19 MR. KELTER: Well, Nicor wants the order.

20 MR. PERA: Nicor wants an order to compel the
21 production of the tapes. Fine with us.

22 JUDGE HAYNES: Is there any objection from any

1 party that we direct them as opposed to --.

2 MR. KELTER: No.

3 JUDGE DOLAN: You'd prefer a written ruling
4 from the Commission?

5 MR. ROONEY: Yeah, that would be great.
6 Please.

7 JUDGE DOLAN: Just directing you to turn over
8 all of the tape-recordings or --.

9 JUDGE HAYNES: Nicor's internal recordings.

10 MR. ROONEY: From April of 2001 to 12/31 of
11 '02.

12 JUDGE HAYNES: Okay. And if there's no
13 objection from the parties, is there anything else?

14 MR. REICHART: Yes. Staff would like to make
15 an on-the-record request that Nicor provide an
16 extra -- or create an extra copy of the tapes for
17 staff.

18 And if you could hold them -- alert us
19 when they are ready, hold them and we will contact
20 you about arranging to pick them up.

21 MR. ROONEY: As I indicated earlier, I'd get
22 back to you, John, on that either be the end of the

1 day or tomorrow morning.

2 JUDGE HAYNES: Okay.

3 JUDGE DOLAN: All right. With that then, we
4 are entered and continued until July 21st, 2004, at
5 10:00 a.m.

6 (Whereupon, further proceedings
7 in the above-entitled matter
8 were continued to July 21, 2004,
9 at 10:00 a.m.)

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